

**DISTRICT OF COLUMBIA  
OFFICE OF ADMINISTRATIVE HEARINGS**

825 North Capitol Street, NE, Suite 4150

Washington, DC 20002-4210

Telephone: (202) 442-9094

Fax: (202) 442-4789

DISTRICT OF COLUMBIA  
DEPARTMENT OF HEALTH  
Petitioner,

v.

CVS PHARMACY #1363  
Respondent.

Case No.: DH-I-07-D100274

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**FINAL ORDER**

**I. INTRODUCTION**

On June 13, 2008, I consolidated this matter with nine other Notices of Infraction (“NOI”). OAH Rule 2919. However, I also separated non-“Return to Stock”<sup>1</sup> violations for resolution in separate Final Orders. OAH Rule 2919.3. This NOI concerns CVS Pharmacy #1363 and whether it sold or offered for sale adulterated or misbranded drugs in violation of D.C. Code, 2001 Ed. §47-2885.13(a).<sup>2</sup> The other NOI associated with this violation (D100292) was dismissed in my June 13, 2008, Final Order.

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Code, 2001 Ed. §§ 2-1801.01 *et seq.*) and D.C. Code, 2001 Ed. §47-2885.13(a). By Notice of Infraction No. D100274, served on July 25, 2007, the Government charged Respondent, CVS Pharmacy #1363, with violating D.C. Code, 2001 Ed. §47-2885.13(a), by selling a thirty-day supply of unit-of-use

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<sup>1</sup> Ultimately, the Return to Stock issue involved Respondent’s policy concerning labeling individual medication containers used for the sale of controlled substances.

<sup>2</sup> D.C. Code, 2001 Ed. §47-2885.13(a) prohibits the sale or dispensation of prescription drugs “after the expiration date designated on the label of the original container.”

Chromagen Forte to Danielle Evans Atkinson, even though some portion of that supply expired in calendar year 2006. *See also* 22 District of Columbia Municipal Regulations (“DCMR”) 1909.6<sup>3</sup> The Government alleged that the violations occurred on February 16, 2007, at 660 Rhode Island Ave., NE and sought a \$1,000 fine. Respondent filed a denial on December 6, 2007.

A hearing was held in this matter on January 25, 2008. Thomas Collier, Esquire, represented the Government. Jawara Kasimu-Graham, Pharmacist, appeared with Mr. Collier on behalf of the Government. Respondent was been represented by Edward Krill, Esquire. Earl Ettienne, Senior Pharmacy Supervisor, appeared as corporate representative for Respondent. No exhibits were admitted into evidence during the hearing; however based on the consent of the parties, documents are admitted into evidence with this Final Order.

Before completion of the January 25, 2008, evidentiary hearing, I granted the parties’ request to stay this matter so the parties attempted to settle this and nine other outstanding NOIs. They were unsuccessful and both parties have consented to this matter being resolved on the entire record herein, including documents that were filed in advance of the hearing, but not admitted at the abbreviated January 25, 2008, hearing.

Based on the evidence adduced at trial, the documents admitted by this Final Order filed in advance of the hearing, arguments of counsel and the entire record herein, I make the following findings of fact and conclusions of law.

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<sup>3</sup> 22 DCMR 1909.6 reads in full:

Drugs and medical devices with expired dating, or that are otherwise misbranded or adulterated, shall not be stored with currently dated products or those that are safe for their intended purposes, but shall be separated from active stock and so identified.

## **II. FINDINGS OF FACT**

1. Danielle Evans-Atkinson filed a complaint with the District of Columbia Board of Pharmacy on March 30, 2007, alleging that Respondent's store number 1363, located at 660 Rhode Island Ave., NE, sold her expired Chromagen Forte capsules, a prescription drug. Exhibit 101. Specifically, Ms. Evans-Atkinson complained that on February 16, 2007, she purchased Chromagen Forte, some of which had expired in calendar year 2006. Exhibits 101, 200.

2. On April 17, 2007, Jawara Kasimu-Graham, Pharmacist for the Department of Health, conducted an annual inspection of Respondent's store number 1363 and a complaint investigation for the Board of Pharmacy in response to Ms. Evans-Atkinson's complaint. Exhibits 100, 101. During this inspection, Mr. Kasimu-Graham discovered "no deficient practices . . . , to include no expired medications." Exhibit 101. However, the conclusion of his complaint investigation was that Respondent had sold Ms. Evans-Atkinson expired Chromagen Forte. Exhibit 101. Mr. Kasimu-Graham determined that "[n]o harm was done to the customer as a direct result of the fact that some of the medication that was ingested had expired dating." Exhibit 101.

3. Judith Sanders, Pharmacist for store number 1363, also conducted an investigation of Ms. Evans-Atkinson's complaint. Exhibit 200. Ms. Sanders determined that Respondent had sold Ms. Evans-Atkinson expired Chromagen Forte capsules. Exhibit 200.

### III. DISCUSSION AND CONCLUSIONS OF LAW

The Government alleged that Respondent violated D.C. Code, 2001 Ed. §47-2885.13(a), by selling expired Chromagen Forte to Ms. Evans-Atkinson on or about February 16, 2007. Respondent acknowledged that it sold the expired Chromagen Forte to Ms. Evans-Atkinson, but denied that it violated D.C. Code, 2001 Ed. §47-2885.13(a). A violation of D.C. Code, 2001 Ed. §47-2885.13(a) is a Class 2 infraction punishable by a maximum \$1,000 fine for a first offense. 16 DCMR 3201.1(b); 16 DCMR 3615.2(p).

D.C. Code, 2001 Ed. §47-2885.13(a) specifically prohibits the sale or dispensation of prescription drugs “after the expiration date designated on the label of the original container.” Respondent’s own pharmacist, Judith Sanders, investigated Ms. Evans-Atkinson’s complaint and determined that on or about February 16, 2007, Respondent sold Ms. Evans-Atkinson expired Chromagen Forte. Exhibit 200. Additionally, the Government’s investigating pharmacist, Jawara Kasimu-Graham, independently verified that Respondent sold Ms. Evans-Atkinson expired Chromagen Forte on or about February 16, 2007. Exhibit 101. While it may be accurate that Ms. Evans-Atkinson suffered no harmful effects from ingesting the expired Chromagen Forte, harm to the customer is not the dispositive factor in determining whether a pharmacy has violated D.C. Code, 2001 Ed. §47-2885.13(a). Rather, the sale or offering for sale of expired prescription drugs is the operative consideration. The Government has proven by a preponderance of evidence that Respondent violated D.C. Code, 2001 Ed. §47-2885.13(a), by selling expired Chromagen Forte on or about February 16, 2007, to Ms. Evans-Atkinson. Exhibits 101, 200. I impose a \$1,000 fine.

#### **IV. ORDER**

Therefore, based on the entire record herein, it is this 23<sup>rd</sup> day of June 2008

**ORDERED** that the Government's exhibits 100 and 101 and Respondent's exhibit 200 are **ADMITTED** into evidence; it is further

**ORDERED** that Respondent CVS Store #2174 is **LIABLE** for violating D.C. Code, 2001 Ed. §47-2885.13(a), as charged in Notice of Infraction No. D100274; it is further

**ORDERED** that Respondent shall pay a fine in the amount of **ONE THOUSAND DOLLARS (\$1,000)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (15 calendar days plus 5 days for service by mail pursuant, to D.C. Code, 2001 Ed. §§ 2-1802.04 and 2-1802.05); it is further

**ORDERED** that, if Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, by law, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i)(1); it is further

**ORDERED** that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(f), the placement of a lien on real or personal property owned by Respondent, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Code, 2001 Ed. § 2-1801.03(b)(7); it is further

**ORDERED** that the appeal rights of any person aggrieved by this Order are stated below.

June 23, 2008

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Jesse P. Goode  
Administrative Law Judge